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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CONWAY CORPORATION, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

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INTEREST OF THIS AMICUS CURIAE

The Petitioners and the Respondent have consented to the filing of this brief by the American Public Power Association as Amicus Curiae. Our brief supports the decision below.

The American Public Power Association (hereinafter "APPA") is a national service organization representing over 1,400 local consumer-owned electric utility power systems in 48 States, Puerto Rico, the Virgin Islands and Guam. The Association's membership includes municipalities, public utility districts, rural electric cooperatives, and other consumer-owned public power systems.

Many of APPA's members purchase all or part of their electric power requirements at wholesale from public utilities subject to regulation by the Federal

Power Commission. These consumer-owned systems compete with their wholesale power suppliers for existing and potential customers. A utility, by fixing its wholesale rates to a municipality at a higher level than the utility's retail rates, can prevent that municipality from offering to industry a retail rate as low as those which the utility itself offers. This is the "price squeeze" that we are talking about in this case.[1]

QUESTIONS PRESENTED

Whether the Federal Power Commission, in adjudicating a utility's proposed rate for service at wholesale to other utilities with which it competes at the level of retail sales of electricity, is required by the

[1] The magnitude of the problem, to which many of APPA's members can attest, was well stated by a former Chairman of the Federal Power Commission in 1965:

> "To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.
> "The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect wholesale rate regulation in the electric power industry is unique and faces far greater resistance by the privately-owned utilities than retail ratemaking. . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of these small and medium-sized power systems is unmistakable." *Hearings on S. 218 Before the Senate Committee on Commerce*, 89th Cong., 1st Sess. 68 and 79 (1965).

Federal Power Act to take into consideration (1) evidence that the proposed wholesale rate is higher than the retail rate for which that same utility has sought and obtained the approval of a state regulatory commission, and (2) evidence that the discrimination thereby established prevents the purchasing utility from competing for retail business with the utility from which it purchases its supply of electricity.

If the answer is affirmative, as decided by the court of appeals, a second question is whether the Commission has authority to adjust a public utility's rate of return on common equity to be yielded by wholesale rates in order to prevent undue discrimination and anticompetitive consequences.

The present Commission, not only in the case at bar but consistently in a number of cases[2] involving APPA members, has refused permission to municipalities to offer evidence of a company's discrimination between its wholesale and retail rates and has denied permission to record offers of proof thereof to enable a proper record to be made on appeal. Its grounds are that, since FPC lacks jurisdiction over retail rates, which are within the jurisdiction of state commissions, it cannot receive evidence that the company whose application for a wholesale rate increase is before the Commission has made that rate higher than the retail rates submitted to a state commission for approval even if it is alleged that the purpose was

[2] *E.g.*, Southern California Edison Co., 50 F.P.C. 836 (1973); Florida Power & Light Co., 50 F.P.C. 1626 (1973); Order of January 3, 1974, in Union Electric Co., Docket No. E-8215; Opinion No. 681 of January 7, 1974, in Commonwealth Edison Co., Docket No. E-7578; Order of February 28, 1974, in Public Service Co. of Oklahoma, Docket No. E-8242; Order of April 19, 1974, in Wisconsin Electric Co., Docket No. E-8619.

to drive its publicly owned wholesale customer, its retail competitor, out of business in consequence of this "price squeeze."

The court of appeals decision, reversing the Commission, was a salutary one, and should be sustained.

We respectfully ask the Court's particular attention to our discussion in Part II of the remedies available to the Commission to stop the use of price as a weapon to destroy competition.

STATEMENT OF THE CASE

1. The Competitive Situation

As a "public utility" within the meaning of section 201(e) of the Federal Power Act, 16 U.S.C. § 824 *et seq.*, Arkansas Power & Light Company (hereinafter "AP&L") is subject to FPC jurisdiction. The FPC regulates AP&L's "sales for resale" to wholesale customers pursuant to sections 205 and 206 of the Act while AP&L's direct sales to retail customers are regulated by the Arkansas Public Service Commission.

The company sells power at wholesale to municipal and cooperative utilities, including the parties in this case. They purchase all, or a major portion of, their electric power requirements from AP&L and, in turn, supply electricity to their own retail customers.

Here, as is true generally, the wholesale power customers compete with their supplier for retail business, particularly prospective industrial and commercial customers. As elsewhere in the United States, the municipalities desire to attract new industrial loads within their service areas not only to obtain added electric revenues but because of attendant economic benefits, *i.e.*, new jobs created by construction, plant positions,

and service and commercial businesses. Besides the factors of favorable taxation, labor market, housing availability, and services provided by the competing utilities, the price of electric power represents a major factor in industrial plant siting.[3] Consequently, a utility offering lower retail rates than its competitor has an advantage in securing new customers.

The wholesaling utility can control competition by either depressing industrial retail rates or by increasing wholesale rates, thereby rendering the wholesale customers unable to offer competitive rates to the same prospective industrial customers. The wholesale customers here complain that the company has established wholesale rates higher than its retail rates to accomplish this very purpose. FPC seems to postulate that the company may have depressed its retail rates, instead. The wholesale customers are squeezed in this supposed regulatory gap.

In these respects, this case is a typical example of a problem repeatedly encountered by APPA's members. We say that the gap is nonexistent, that FPC has authority which it has refused to exercise.

2. Federal Power Commission Proceedings

On May 31, 1973, AP&L filed an application requesting an increased wholesale rate for the resale customers involved in this case. The Commission accepted the rate for filing but suspended the effective date for five months, the maximum suspension period authorized by the Federal Power Act.

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[3] Price of energy as a factor in determining plant sites is probably more predominant today than at any time in the Nation's history since energy costs are becoming a significant component of production cost and market price of goods produced.

The Commission, in several orders, held that it lacked jurisdiction to consider the alleged anticompetitive discrimination and that it lacked jurisdiction to order a remedy, and refused to permit the municipalities to intervene for the purpose of presenting evidence on these issues. There has been no trial. The issues presented are solely questions of law.

3. Opinion of the Court of Appeals

Upon review, the court of appeals rejected the Commission's disclaimer of authority, recognizing that

> "Through its position as supplier, AP&L will be able, if there is no FPC jurisdiction to consider the public interest in AP&L's discriminatory levels, to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor." *Conway Corporation* v. *FPC*, 510 F.2d 1264, 1269 (D.C. Cir. 1975).

The court of appeals said that

> ". . . we see a statute that confers plenary jurisdiction to review the interstate wholesale rate and to provide relief addressed to such wholesale rate in order to further the public interest." *Id.* at 1272.

As for an appropriate remedy to cure anticompetitive discriminatory rates, the court determined that the rate of return on a wholesale rate could be adjusted within the zone of reasonableness:

> "There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers." *Id.* at 1274.

We agree.

ARGUMENT

I. THE FPC IS REQUIRED BY THE FEDERAL POWER ACT TO CONSIDER THE ANTICOMPETITIVE PURPOSE AND EFFECT OF A PROPOSED WHOLESALE RATE, AND IN SO DOING TO COMPARE THAT RATE WITH THE COMPANY'S RETAIL RATES

The case before the Court involves interpretation of the Federal Power Commission's responsibilities and duties under section 205(b) of the Federal Power Act which makes it unlawful for any public utility "with respect to any transmission or sale subject to the jurisdiction of the Commission" to

> "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

The FPC construes its responsibilities narrowly, turning its back on the competitive problem recognized by the court of appeals. The court said:

> "The competitive context in which petitioners operate sets the stage for our analysis. In competing with supplying companies, municipal and cooperative systems seek to maintain customer satisfaction with the quality and price of their service in order to attract new industries and to retain existing customers; continued satisfaction is also necessary to ensure voter support for the municipal systems. At its most basic level, this competi-

tion represents a struggle on the part of the municipal and cooperative systems to preserve their independence from their supplier insofar as they compete at retail. 510 F.2d at 1268.

* * * * *

"Through its position as supplier, AP&L will be able, if there is no FPC jurisdiction to consider the public interest in AP&L's discriminatory levels, to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor."[4] *Id.* at 1269.

As the court of appeals said, a "fair interpretation of the statute," considering Congress' purposes and policies, and this Court's recent decisions, reveals that the Commission has "plenary jurisdiction to review the interstate wholesale rate and to provide relief . . . in order to further the public interest." 510 F.2d at 1272. Otherwise, the statute is meaningless, and the

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[4] Another description of the problem is:

"A second, and clearer, opportunity to use pricing power anticompetitively occurs when a firm is both a wholesale supplier and a competitor for retail sales. By maintaining its wholesale price at a level that substantially disadvantages the purchasing firm in any competitive confrontation, the supplying firm can protect against forays into its territory by the customer, insure an advantage in competition for new loads . . . ."

Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 119 (1972). See also Richmond Power & Light Co. v. FPC, 481 F.2d 490, 496 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973):

"Absent such protection, I&M could offer a lower price to its industrial retail customers than Richmond would be able to offer, thereby directing new industries away from Richmond's service territory and into I&M's retail service territory. And because of concerns relating to such matters as employment and the property tax base, Richmond, a municipally owned company, had an interest in encouraging industries to locate in its service territory."

Commission's ratemaking authority[5] can be used to condone anticompetitive practices which Congress intended to prohibit.

A. The Purposes and Policies of the Federal Power Act

Congress passed the Act because of the absence of antitrust enforcement to restrain the growth and abusive activities of public utility companies. S. REP. No. 621, 74th Cong., 1st Sess. *passim* (1935). Congress sought two objectives:

"to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce."[6] *Gulf States Utilities Company* v. *FPC*, 411 U.S. 747, 758 (1973).

Congress desired to prevent restraint of competition and established "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co.* v.

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[5] The parties in this case and the court of appeals have focused on the Commission's jurisdiction over AP&L because of "the sale of electric energy at wholesale in interstate commerce." The Act also grants authority to FPC over "the transmission of electric energy in interstate commerce." Although the question was not addressed below, in our view the "transmission" clause, identical to the "transportation" clause in the Natural Gas Act, prohibits a utility's discriminatory treatment as between direct retail customers and resale customers, when read in conjunction with section 205 of the Federal Power Act. *See* FPC v. Louisiana Power & Light Company, 406 U.S. 621 (1972); American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974).

[6] See S. REP. No. 621, *supra* at 1-4, 17-20; H.R. REP. No. 1318, 74th Cong., 1st Sess. 3, 7-8 (1935).

United States, 410 U.S. 366, 374 (1973). In preventing abusive practices and in seeking to maintain maximum competition Congress sought to protect consumers against exploitation, affording consumers a complete, permanent and effective bond of protection from excessive rates and charges. *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137 (1960); *Atlantic Refining Co.* v. *Public Service Comm'n of State of N.Y.,* 360 U.S. 378 (1959).

B. The Commission's Broad Authority to Preserve Competition

This Court, in response to previous FPC assertions of narrow authority jurisdiction, has told the Commission that it has "broad authority to consider anticompetitive and other conduct touching the 'public interest' . . . ." *Gulf States, supra* at 757. In that decision the Court repeatedly and emphatically instructed the Commission. It told the Commission the mandate that section 204 of the Act (relating to approval of security issues) imposes "is a broad and impressive one." *Id.* at 756. The Court noted that the Act sets forth the requirement "that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws" (*id.* at 759) and the Commission "possesses broad regulatory authority . . . [and] is charged with responsibility for considering antitrust policy under its statute." *Id.* at 761. And, the Act "*vested the Federal Power Commission with important and broad regulatory power* in the areas described above," *i.e.,* sections 205 and 206 of the Act. *Id.* at 758. (Emphasis added.) The Court spoke of sections 204, 205, and 206 as "these adjacent" sections, implying a common thread of purpose.

Although the Commission fought its responsibility under section 204, it conceded "*that allegations of anticompetitive conduct properly may be raised and fully considered in other proceedings related to . . . rates and rate-making practices under §§ 205 and 206 . . . .*" *Id.* at 757. (Emphasis supplied.) But it now (and in many like cases) reverses that representation, and abjures any responsibility to examine allegations of anticompetitive conduct in a section 205 case, if the destruction of competition is accomplished by a "price squeeze" between two rates set by the same company, one of them being a lower retail rate. And although the dissent in *Gulf States* argued that anticompetitive allegations have no place in section 204 proceedings, Justice Powell in that dissent (joined by Justice Stewart and Justice Rehnquist) recognized that the "Commission acknowledges a duty to scrutinize allegedly anticompetitive behavior in proceedings . . . to review rates . . . and to review a charge of unduly discriminatory rates or practices." *Id.* at 768. Here the Commission has declined to do just that.

C. Application of the Act's Purpose and this Court's Instructions to the Instant Case

Examination of the Commission's narrow view reveals its incongruity. The Commission admits that it can prevent undue discrimination as between rates applicable to different wholesale customers. It seems to believe that such a situation is the whole scope of the mandate in section 205 to prevent discrimination.

But discrimination cases, involving only rates as between wholesale customers, have nothing to do with the purpose of the Act involved here, *i.e.,* to prevent anticompetitive, abusive practices, and have nothing

to do with the Commission's "important and broad regulatory power" in that field. *Gulf States, supra* at 758. If a utility sets discriminatory rates for two different wholesale customers, such conduct may be unlawful, but not on the ground involved here, *i.e.,* prohibition of a utility's creation of a competitive advantage for *itself,* by abuse of its monopoly. The Commission's "important and broad regulatory power" in order to carry out the "fundamental national economic policy expressed in the antitrust laws" (*Gulf States, supra* at 758-59) manifestly envisions more than eliminating rate discrimination in the wholesale class.

Congress intended the Commission to assure the maximum amount of competition; Congress desired to prevent abusive practices; Congress desired that the Commission "consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws" (*id.* at 759); Congress intended to check abuses of concentrated economic and political power; Congress desired protection of consumers because of the absence of antitrust enforcement; and Congress, as determined by the Court, granted the Commission broad authority to carry forth its purposes and policies.

The Commission cannot carry out Congress' policy unless it acts to prevent the type of anticompetitive price squeeze of which this case is the exemplar.

D. The FPC's Narrow View of Its Jurisdiction Is Not Supported By Precedent

The cases FPC and AP&L point to as constituting consistent interpretation of limited jurisdictional authority do nothing of the sort.

A 1940 case, *Otter Tail Power Company,* 2 F.P.C. 134, is the closest the Commission has come to the questions involved in the instant case. The *Otter Tail* case involved not just discriminatory rates among wholesale customers, but also discrimination between Otter Tail's own retail rates and its wholesale rates. There, the Commission said:

> "There is one other phase of discrimination which we should mention. Given a monopolistic position and the right to discriminate, an electric utility company is in possession of a strong and unfair weapon in its dealings with municipalities. The facts of this case point clearly to the manner in which this may come into play." *Id.* at 143.

The "facts" which the Commission spoke of were as follows:

> "It appears in large part that the reason the rates were maintained at such a high level was to force the village out of ownership of its distribution system and to require it to dispose of its facilities to the respondent . . . ." *Id.*

The Commission then noted that "this little municipality . . . finally capitulated and the respondent achieved its objective of acquiring its distribution system." *Id.* at 144.

The Commission was appalled at the company's conduct, and in what we submit was an alternate holding in the case, said (*id.* at 145):

> "The foregoing is illustrative of the conditions which may and do exist when the sole power to determine rates is left within the hands of the utility which has a monopoly of the service and when, in addition, the utility has the power to discriminate against customers in a weak bargaining position. *It clearly illustrates the reasons why*

Congress, following the pattern of the usual regulatory statutes, declared such discriminations unlawful." (Emphasis added.)

As a remedy, the Commission recognized that: "There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned." (*Id.* at 149.)

We come now to consideration of the "zone of reasonableness" concept.

II. THE COMMISSION HAS FULL AUTHORITY TO REMEDY A PRICE SQUEEZE BETWEEN WHOLESALE AND RETAIL RATES

A. The Concept of "Zone of Reasonableness"

The court of appeals formulated a remedy in the event the Commission found that price squeeze allegations were true:

> "When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain retail revenues in order to curb the retail competition of its wholesale customers." 510 F.2d at 1274.

But the Commission now disagrees, as it did in the court of appeals, by contending that there is no such thing as a "'zone of reasonableness' in electric utility ratemaking because precise data is available and rates are reviewed on a company-by-company basis." (FPC Brief, at 36, n. 31.) The court of appeals, citing the FPC's own *Otter Tail* decision (2 F.P.C. 134, 149

(1940)), hoisted the Commission by its own petard. In the *Otter Tail* case, the Commission had said:

> "It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se,* if considered independently, might fall within the zone of reasonableness. *There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned.* The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed." *Otter Tail Co., supra* at 149.[7] (Emphasis added.)

In another discrimination case, *Southwestern Public Service Co.,* 33 F.P.C. 343, 354 (1960), the Commission said:

> "We are further aware that there is no precise answer to the question of a rate of return but rather that there is a zone of reasonableness within which the Commission is free to fix a rate. We feel free within the ambit of our statutory authority and the standards of due process to make the pragmatic adjustments which are called for in each particular case. [Citation omitted.] We think this is a case which peculiarly requires such adjustments.
>
> "Southwestern, by the establishment of the rates to the Cooperatives here under consideration, has agreed to what we consider the lower limits of a zone of reasonableness."

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[7] As we point out, *supra,* the purpose of the discriminatory high rates in the early *Otter Tail* case was to force the small municipalities out of business. The Commission found that the company's tactics were to place the wholesale rate so far above its own retail rates that the municipalities would be forced to sell their systems to Otter Tail.

If the "zone of reasonableness" concept was good law in the Commission in 1940 and 1960, why not now?

The courts have recognized that "[r]atemaking is not a science," *El Paso Natural Gas Co.* v. *FPC,* 449 F.2d 1245, 1248 (D.C. Cir. 1971), and that there is considerable room for subjective and judgmental factors. And by far the most subjective part of ratemaking is the determination of a "fair rate of return," a determination which the Commission now tells the Court is most precise.

While it is true that the rate of return determination for *senior* capital is rather precise, that is only one part of the rate-determining process. As Professor Bonbright has explained:

> "... the analyst usually finds no difficulty in computing the cost of senior capital with fair precision. Actual fixed charges on the debt plus actual dividend requirements on the preferred stock represent the annual cost in terms of dollars. The dollar figures are then converted into percentages of each type of capital as measured by the net contribution which the company has received from the issuance of the bonds and of the preferred stock."[8]

The determination of rate of return for common equity, however, is an entirely different matter. As one author stated:[9]

> "By far the most difficult and controversial part of determining the cost of capital is the estimation of the cost of common stock capital.
>
> * * * * *

[8] J. Bonbright, Principles of Public Utility Rates, 244-45 (1961).

[9] P. Garfield & W. Lovejoy, Public Utility Economics, 125 (1964).

> "The big problem is how to estimate accurately the amount of return just large enough 'to assure confidence in the financial soundness of the utility ..., to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties,' while still allowing no more than is 'necessary'."

The zone of reasonableness of return on common equity, and of the correlative rate for electrical service, is the concept to which regulatory commissions and courts have resorted to find fair solutions in this "difficult and controversial" area.

The subjectiveness of the exercise can be appreciated by reference to the comparable earnings test, as set forth in *Bluefield Waterworks and Improvement Co.* v. *Public Service Commission,* 262 U.S. 679, 692 (1923):

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties ...."

Or as formulated later:

> "... [T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 at 603 (1944).

In addition, the test requires the return to be sufficient to attract capital:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Bluefield Waterworks* at 693.

Many other subjective factors are relevant in the computation of a fair rate of return for common equity. For example, in *Panhandle Eastern Pipe Line Company* v. *FPC*, 324 U.S. 635, 650 n. 9 (1945), the Court upheld the Commission's consideration of numerous factors, including the fact that "the respondent's business is exceptionally free from serious business hazards."

As the Court stated in *Hope, Bluefield,* and *Panhandle,* one of the subjective factors is risk.[10] Competition is a risk factor.

> "Another type of risk facing every firm in any industry is competitive risk, or the risk of loss of business to other firms offering the same or substitute products or services." GARFIELD and LOVEJOY, *supra* at 122.

Electric public utilities compete with gas utilities and other energy forms, but

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[10] In the Permian Basin Rate Cases, 390 U.S. 747, 807 (1968), the Court upheld the Commission's selection of 12% as the proper rate of return on common equity, recognizing that "producers characteristically have less long-term debt than pipelines, and that the financial risks of production are somewhat greater than those of transmission." (Footnotes omitted.) The Court recognized that "these differences warranted a more generous rate of return for producers." *Id.*

> "In addition, electric utilities in some instances face competition from government-owned or -sponsored electric operations." *Id.*

In the instant case, "risk" certainly is a factor to be considered in rate of return determination since AP&L competes with its wholesale customers for retail customers. Surely anticompetitive conduct which enhances a utility's monopolistic position and which allows a utility to obtain an unfair advantage in attracting new customers reduces a utility's risk of doing business. Therefore, the rate of return for common equity should be reduced to eliminate such an unfair competitive advantage, restoring the public utility and its resale customers to a balanced competitive situation. The "zone of reasonableness" allows such latitude.

B. Procedure Available to the Commission

We envision that the Commission's responsibilities and duties to adjust a price squeeze rate would be invoked in two stages after a rate increase had been filed. First, if a customer should petition to intervene to raise a price squeeze issue, the Commission could examine the validity of the allegation during the suspension period which may not exceed five months. (Section 205(e).) Using the cost of service material filed by the applicant, the reports in the Commission's files, its powers under section 208 of the Act, and by obtaining a copy of the applicant's retail tariff for industrial customers, the Commission certainly would be able to determine whether a prima facie case of discrimination existed. Then the Commission, exercising its powers under section 209 of the Act, could determine whether the applicant had a proceeding pending in a

state commission to increase the retail rate. If no such application were pending which would alleviate the price squeeze, then the Commission could reduce the wholesale rate by summary disposition, pending hearings and a final determination on the proposed rate's lawfulness.[11]

After the issuance of summary disposition, the Commission could proceed with its normal course of hearings before an Administrative Law Judge, briefs, his decision, and a final decision by the Commission itself. That proceeding, of course, would result in a final adjusting of the return on common equity if the price squeeze allegations were found to be valid.

C. The Commission's Objections to the "Zone of Reasonableness" Approach

The Commission has presented an artificial barrier by arguing that if it ordered reductions or adjustments within the zone of reasonableness then the wholesale rate would be less than compensatory.[12] In overstating

[11] Such a summary disposition, with a rate adjustment, cannot be deemed unfair because under present practice a rate, no matter how unreasonable, automatically goes in effect after the suspension period subject to refund following final order. Thus, no matter how onerous the rate may be found years later, by a final order, the consumer suffers until then.

[12] The Commission's brief at n. 33, p. 38, admits that evidence of monopolization "bears upon the risk of investment." But the Commission says "Conway's allegations, however, were not of this kind; rather, it asked the Commission to determine the wholesale rate by reference to nonjurisdictional retail rates." That, we submit, is a non sequitur. How can the Commission consider "evidence of monopolization, which bears upon the risk associated with investment" without looking to the device used to monopolize, the weapon of price? It declined to permit the municipalities to intervene to offer evidence on this issue.

the issue, the Commission poses the hypothetical case whereby wholesale rates must be adjusted to equal retail rates, which the utility may have voluntarily "depressed" (presumably to eliminate the municipality's competition).

The Commission's hypothetical instance of a voluntarily depressed retail rate raises visions of a very low retail rate of return requiring FPC to reduce wholesale rates accordingly. Such a situation probably never would occur because no utility can voluntarily agree to a non-compensatory rate of return on common equity for sales to its retail class and expect to stay in business very long. (Characteristically, as here, retail rates account for more than 90 percent of a utility's revenues, while wholesale sales represent less than 10 percent).

The usual situation, more realistic than the Commission's fanciful hypothesis of a ruinous retail rate, would be one where both wholesale and retail rates produce a rate of return within the zone of reasonableness. In such a situation, the rate of return on common equity to be yielded by the wholesale rate could be reduced a small amount to restore competition, while still retaining a return on common equity which is within the zone of reasonableness. For example, if the industrial retail rate returned 11.2 percent on common equity while the proposed wholesale rate returned 11.9 percent on common, the wholesale return could be adjusted slightly to eliminate a price squeeze situation and both rates would be in the zone of reasonableness, furnishing the company a compensatory return. Thus, the wholesale customer, by virtue of a slight adjustment, would be able to compete for industrial customers with the public utility.

But if some public utility did purposely depress industrial retail rates to an extremely low level in order to eliminate competition, such a company should be estopped from complaining if the Federal Power Commission should reduce the wholesale rate to equal the retail rate which the company voluntarily depressed for this anticompetitive purpose. Since retail sales, here, as elsewhere, produce more than ten times the total revenue produced by wholesale sales, it would seem odd for a company to commit financial suicide by voluntarily depressing its retail rates below a reasonable rate of return on common equity, just to get rid of its pesky wholesale customers. Burning down the house to roast the pig, or drowning the dog to get rid of the fleas, is not normally good business practice. At the least, one would expect the FPC to have some curiosity to find out whether its odd assumption of masochism in setting low retail rates, rather than unlawful motives in setting high wholesale rates, is really true. It has no such curiosity, none at all. We say that the Act requires FPC to generate some interest in tendered evidence on this point, instead of rejecting it, in all cases, out of hand, on the simplistic argument that retail rates are outside of its zone of interest because they are outside of its zone of jurisdiction.

The statute encourages FPC and state commissions to work in concert, not on opposite sides of an iron jurisdictional curtain. Thus FPC "*upon its own motion,* or upon the request of any State commission . . . may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission *in cases where the Commission has no authority to estab-*

lish a rate governing the sale of such energy." (Emphasis added.) (Section 206(b).)

FPC "may refer any matter arising in the administration of this Part to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter . . . . The board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission." (Section 209(a).)

FPC "*may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.*" (Emphasis added.) (Section 209(b).)

Here, the Commission has done none of these things. It disclaims any responsibility for or interest in "the relationship between rate structures," etc., ". . . subject to the jurisdiction of such State commission and of the Commission . . . ."

If FPC did what the statute authorizes it to do, a price squeeze could not survive the joint scrutiny of the federal and state commissions which are being

whipsawed by a company's inconsistent and discriminatory wholesale and retail rate proposals.

It is the FPC's responsibility not just to fix rates in a vacuum, but to make sure that rates are not discriminatory. The surest way to do that is to hold the company to its own representation to the state commission that its retail rates, lower than its proposed wholesale rates, yield it a satisfactory return on the investment.

Instead, FPC chooses to reject evidence that the same company has made contradictory representations to the federal and state commissions, for the prohibited purpose of enabling it to destroy competition.

III. THE COMMISSION'S REFUSAL TO ACCEPT JURISDICTION CREATES A REGULATORY GAP

A. Regulatory Gaps Between the State Commission and the FPC

The Federal Power Act, like the Natural Gas Act, 15 U.S.C. § 717, *et seq.*,[13] granted FPC broad power to protect consumers against exploitation, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944), and Congress intended to create a comprehensive regulatory scheme, although there was to be dual state and federal authority. *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964). Even with the dual authority, however, Congress desired the Federal Power Commission to exercise broad authority over public utilities "so that there would be no 'gaps' for private interests to subvert the public welfare." *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972).

[13] The history of the Natural Gas Act and precedents thereunder are applicable to the Federal Power Act. FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

This Court has explicitly frowned upon vacuums in regulation where the public interest would be subverted thereby:

> ". . . Congress did not desire that an important aspect of this field be left unregulated. [Citation omitted.] Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. [Citation omitted.] That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." *FPC* v. *Transcontinental Gas Pipeline Co.*, 365 U.S. 1, 19-20 (1961).

Can state authority regulate in the gap which the Commission proposes to create? Certainly not; no one can contend that the States have any jurisdiction over wholesale rates. The answer is for the FPC to assume its congressionally mandated responsibilities. Otherwise, as the court of appeals said, "no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition . . . ." 510 F.2d at 1272.

B. The Commission Errs in Desiring to Force the Wholesale Customers to Seek Relief in Federal Courts under the Sherman Act

The Commission blandly walks away from its responsibilities by arguing that no regulatory gap exists because "the price squeeze alleged herein . . . is cognizable in the federal courts" under the Sherman

Act, 15 U.S.C. § 1 *et seq.* (Brief at 41). The Commission's position, however, ignores the teaching of this Court that:

> "Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing *a first line of defense* against those competitive practices that might later be the subject of antitrust proceedings." *Gulf States, supra* at 760 (emphasis added).

The Commission not only is unwilling to exercise its "important and broad authority" to maintain competition "to the maximum extent possible," and to establish "a first line of defense," but it is unwilling even to send out a scout. The FPC's position is all the more untenable considering that it told this Court in *Gulf States* that it did have authority to prevent anticompetitive conduct under sections 205 and 206. *Gulf States, supra* at 757.

CONCLUSION

For the foregoing reasons, the American Public Power Association, as amicus curiae, recommends that the decision of the court of appeals be affirmed.

Respectfully submitted,

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